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Before the  
Federal Communications Commission  
Washington, D.C. 20554

OCT 21 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Telecommunications	)	CC Docket No. 96-115
Act of 1996:	)	
	)	
Telecommunications Carriers' Use of		
Customer Proprietary Network Information	)	
And Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	
	)	
2000 Biennial Regulatory Review --	)	
Review of Policies and Rules Concerning	)	CC Docket No. 00-257
Unauthorized Changes of Consumers'	)	
Long Distance Carriers	)	

COMMENTS OF AMERICA ONLINE, INC.

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**COMMENTS OF AMERICA ONLINE, INC.**

America Online, Inc. ("AOL"), by its attorneys, files these comments in response to the Third Further Notice of Proposed Rulemaking<sup>1</sup> in the above-captioned proceedings. **As** described below, AOL urges the Commission to clarify and refine its customer propriety network information ("CPNI") rules to protect effectively the competitively-sensitive CPNI of information service providers ("ISPs") when they order telecommunications services from carriers and state clearly that neither bankruptcy nor the sale of assets excuses a carrier from compliance with their CPNI obligations.

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<sup>1</sup> Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd. 14860 (2000) ("**Third FNPRM**").

### Introduction and Summary

**As** the nation's largest Internet and online service provider, AOL uses telecommunications services in a myriad of ways, including ordering services for its own use, for communicating with AOL subscribers, when ordering DSL services as an input to high-speed Internet access, and when ordering services on end user's behalf. **All** of these activities create CPNI that is quite valuable to AOL in its participation in the market among ISPs.

Telecommunications carriers, including incumbent local exchange carriers ("ILECs"), long distance providers and others, hold this AOL CPNI and have the ability, absent Section 222 and implementing FCC regulations, to use it in anticompetitive ways. Indeed, due the *nature* of ISP services, which are offered "via telecommunications," AOL and other ISPs disclose significant and valuable customer information to carriers in the course of doing business, while the carriers oftentimes have ISP affiliates that could unfairly benefit and "free ride" from the customer and market information supplied by independent ISPs in the telecommunications service provisioning process.

AOL believes that the FCC should clarify the several ways that ISPs may protect their CPNI from abuse by carriers under the existing regulatory scheme. **As** discussed below, the FCC should clarify that ISPs may protect order, installation, and repair CPNI by exercising "opt out" under the *Third R&O*, including when ISPs act as agent for end users. In addition, the Commission should clarify that the CPNI prohibition on tracking calls to competitive providers applies fully to end-user consumers calling ISPs. Alternatively, the FCC may need to adopt further proscriptive regulations to prevent carrier abuse of competitively-sensitive CPNI of ISPs. The Commission should also tighten enforcement of CPNI rules.

Further, the FCC should establish that CPNI protections and requirements continue in full force and effect when a carrier exits the market, including in bankruptcy. Bankruptcy protection provides no license for CPNI abuse, and CPNI protections should not be bent or violated merely to create assets for the bankruptcy estate.

Finally, the Commission has established that DSL services are telecommunications services, and DSL providers must comply with Section 222 and implementing FCC regulations. Especially since many ISPs, including AOL, provide significant amounts of highly sensitive CPNI in the DSL ordering process to competing ILECs, CPNI protections are essential to realize the goals of a competitive and diverse high-speed Internet access market. Shifts in the regulatory classification of DSL, which AOL strongly opposes, would compromise competition in the market for high-speed Internet access services and would undermine the existing privacy rights under Section 222 for many thousands of DSL-based subscribers and ISPs.

**I. The FCC Should Clarify Existing Mechanisms for ISPs to Protect Competitively-Sensitive CPNI And, If Necessary, Adopt Additional Protections**

Due to the very nature of providing information services, ISPs must divulge a significant amount of competitively-sensitive information to carriers, especially ILECs, in the course of ordering telecommunications services that support the ISP services to end users.<sup>2</sup> For example, and as the FCC has noted,<sup>3</sup> the ISP is the ILEC's wholesale customer in the provision of bulk DSL which is ultimately used as an input to the high-speed Internet access services of many independent ISPs in the country today. In this process, the ISP typically transmits pre-

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<sup>2</sup> FCC precedent has specifically guarded against ILEC abuse of competitively-sensitive CPNI, see, e.g., *Amendment of Section 64.702 of the Commission's rules and Regulations*. Reort an Order, 104 F.C.C.2d 958 (1986).

<sup>3</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237 (1999).

qualification, order, repair and maintenance information to the ILEC via the ILEC's OSS systems, all of which is CPNI of the ISP. Since the ILECs are also ISPs and quite active participants in the high-speed Internet access market themselves, this information is quite competitively-sensitive, such as when an ISP submits a new DSL order for an end user who is also the ILEC's in-region voice customer.

Moreover, a number of forms of ISP-generated CPNI are quite competitively-sensitive. For example, CPNI regarding end users' dialing patterns, busy signals, or hold-times to an ISP-assigned telephone number, or customer calls to the ISP's customer service centers, reveal a myriad of facts regarding the ISP's service performance, its relationships with customers, and its network configuration. Without regulatory guidance, ILECs and other carriers can and will use the lack of CPNI protections, or lack of clarity regarding the FCC's CPNI rules, to exploit this information. This is fundamentally unfair and unreasonable conduct for carriers to engage in because it is an invasion of privacy rights under Section 222. In addition, it is significantly detrimental to the FCC and Communications Act goals of a vibrant and competitive Internet market because carriers are able to "free-ride" on the independent ISP's time and investment in winning new customers and experimentation with new service network approaches. It is also unfair to consumers because they would have had no reasonable expectation that the information given to ISPs would be exploited subsequently by the underlying carrier. Finally, ISPs also purchase a number of other services from ILECs and other carriers, such as ATM or Frame Relay service, which can be abused by carriers to learn information regarding an ISP's marketing plans, market expansion, anticipated customer volumes, and network configuration.

Similarly, competitively-sensitive information includes CPNI that the ISP orders on the customer's behalf (i.e., as end-user's agent). As the Commission has explained, ISPs can and do

order telecommunications services from ILECs on the end-user's behalf and this is accepted practice in the information services market.<sup>4</sup> Such information, however, is highly valuable because it indicates that the end user has recently placed an order with the ISP for a new information service.

AOL believes that the FCC can protect this competitively-sensitive CPNI under the existing rules and FCC precedent by making three clarifications. *First*, the Commission should clarify that all CPNI provided by the ISP to the carrier, including ordering information and orders submitted on the end user's behalf, is subject to CPNI "opt-out" protection if the ISP chooses to exercise its "opt-out" rights. Thus, an ISP concerned about carrier abuse of CPNI can exercise its rights under the existing CPNI regulatory scheme by submitting a single "opt-out" notice to the carrier, which will apply to all CPNI delivered from the ISP to the carrier.<sup>5</sup> Adoption of this clarification, of course, would put the substantial power to control the anticompetitive use of its CPNI in the hands of the ISP. No additional regulation, therefore, is likely necessary.

*Second*, the FCC should clarify that the current CPNI rule protecting customer communications with competing service providers applies fully to customers communicating with ISPs. FCC Rule Section 64.2005(b)(2) states: "A telecommunications carrier may not use,

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<sup>4</sup> See, e.g., *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3103, 3106, ¶¶ 20-23 (1990) (discussing how ISPs order telecommunications services from BOCs on the end user's behalf and as the end user's agent); *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 6 FCC Rcd. 7646 (FCC 91-382) ¶¶ 56-57 (1991) (noting that ISPs purchase certain telecommunications services from BOCs "on behalf their customers.").

<sup>5</sup> See, e.g., *Third Report and Order*, 17 FCC Rcd. 14860, ¶ 39 (FCC asserts that privacy interests are protected because customers will be provided with effective prior notice to "opt-out" from carrier's use of the customer's CPNI), ¶ 118 ("We require that carriers make available to every customer . . . a method of opt-out that is of no additional cost to the customer and available 24 hours a day, seven days a week.").

disclose or permit access to CPNI to identify or track customers that call competing service providers.”<sup>6</sup> While AOL believes the phrase “competing service providers” clearly would include competing ISPs, clarification that this CPNI protection applies to ISPs and their customers would preclude any ambiguity. In the context of ISPs, such regulatory protection would prevent, for example, ILECs from tracking or monitoring end user calls to ISPs or to JSP customer service centers.

*Third*, the Commission should clarify that the CPNI “retention” rule should apply to ISP orders for change orders and new service orders submitted by ISPs (including when the ISP acts on behalf of the end user).<sup>7</sup> Much like local service competitors, ISPs are also subject to anticompetitive abuses of CPNI ordering information, especially since ISPs must rely on ILEC access services and ordering processes as a means to initiate an information service or to switch information service providers for an end-user. **As** the Commission’s *CPNI Recon Order* (§ 77) pointed out, “where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider in market to that customer, it does so in violation of section 222(b).”<sup>8</sup> For the same reasons, the Commission should clarify that carriers may not exploit CPNI ordering change information when submitted by an ISP. Similarly, even when the ISP submits an order for a “new” service feature for the end user, the carrier may not use that CPNI to engage in customer retention by marketing the same or similar information

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<sup>6</sup> 47 C.F.R. § 64.2005(b)(2).

<sup>7</sup> See, *In the Matter of Implementation of the Telecommunications Act of 1996, et al., Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409, ¶¶ 74-78 (1999) (explaining the CPNI customer retention rule) (“*CPNI Recon. Order*”).

<sup>8</sup> See also, *In the Matter of Implementation of the Telecommunications Act of 1996, et al., Second Report and Order*, 13 FCC Rcd. 8061, 159 (1998) (certain uses of CPNI are anticompetitive and impermissible, such as a “cross-sell to customers purchasing services necessary to use competitors’ offerings (e.g., attempt to sell voice mail service when a customer requests from the LEC the necessary underlying service, call forwarding-variable)”).



services. For example, if an AOL subscriber orders AOL's "call alert" service (a form of Internet call waiting) and so AOL submits an order to the ILEC for call forwarding on the end user's phone line, then the ILEC may not use that call forward order CPNI for marketing purposes, such as for marketing its own Internet call waiting, a second-line service, or high-speed Internet access.

AOL believes that the foregoing three points of clarification can provide ISP competition with substantial protection from CPNI abuse and may avoid the formulation of additional complex regulations for competitively-sensitive CPNI. Alternatively, if these clarification points cannot be reached and ISP CPNI continues to be put at risk from carrier abuse, then AOL would support more prophylactic regulations, such as regulations requiring access restrictions on ILEC personnel, mechanical access restrictions, and other measures to prevent effectively ILEC abuses.'

With regard to enforcement mechanisms, AOL believes that more effective enforcement through modest regulatory changes would greatly improve carrier compliance. For example, while carriers are currently required to certify compliance annually with FCC rules and to have personnel and systems safeguards in place," that certificate should also attest that there has been no sharing or use of competitively-sensitive information when the JSP has exercised its "opt-out" rights and that the carrier has affirmative procedures in place to prevent such CPNI abuse.

Moreover, complaints alleging violation of CPNI by ISPs should have ready access to the FCC's

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<sup>9</sup> See, e.g., *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network and Other Customer Information*, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 (1996), Comments of the Telecommunications Resellers Association, June 11, 1996 at 9-13.

<sup>10</sup> 47 C.F.R. §§ 64.2009(a)-(c) (carriers must have CPNI status system, personnel training, and record retention regarding carrier use of CPNI and customer's CPNI elections), 64.2009(d) (annual officer must sign annual compliance certificate).

accelerated docket process, because time is of the essence and it is difficult for money damages to address the competitive harm in more lengthy litigation.

**II. Customers of Exiting Carriers Should Have Right of Consent Prior To Use/  
Disclosure/Sale of CPNI to a Third Party**

The FCC should make clear that the CPNI rights of a carrier's customers, including ISPs, are in full force and effect regardless of whether the carrier is in bankruptcy or has decided to sell its assets to another carrier. **As** the Commission has explained in its Section 214 processes, the event of a carrier's bankruptcy does not create an exemption from its obligation to comply with Section 222 of the Act and the FCC's implementation of rules protecting consumer interests." It is particularly important for the FCC to take an active role in the case of bankrupt carriers since conditions of financial distress may encourage some to cut costs or aggressively market at the expense of customer rights, to close deals quickly without regulatory compliance, or to maximize the bankruptcy estate without regard to the CPNI rights of a carrier's customers.

The CPNI rights of customers, including without limitation the "opt-out," "opt-in," and other protections, should apply with equal force when a carrier chooses to exit the market and to sell its asset and/or customer base to a third party. In such cases, not only does the Section 214 process apply, but also the Section 222 rights of the carrier's customers should be respected fully. For example, the exiting carrier should have no right to use, disclose, or permit access to CPNI to the acquiring entity in a manner that would violate the FCC's CPNI regulatory scheme, such as by selling access to customer CPNI data for customers who have exercised "opt-out"

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<sup>11</sup> See, Letter from Michael K. Powell, Chairman, FCC, to Hon. Edward J. Markey, Ranking Member, U.S. House of Representatives (July 10, 2002) ("Indeed, carriers filing for reorganization under Chapter 11 of the Bankruptcy Code must still continue to provide service during the pendency of bankruptcy proceedings...").

rights.<sup>12</sup> If a new carrier steps in the place of the exiting carrier, the customer should be provided a reasonable opportunity to evaluate and decide whether it chooses for the new company to access its CPNI. Similarly, as the Commission has recognized, Section 222 applies to all telecommunications, and customers of certain exiting carriers should not be subject to less rigorous privacy protections or be the victims of “more liberal CPNI sharing.”<sup>13</sup>

### III. CPNI Protections Should Continue to Apply to Wireline Broadband, Including DSL Services

As AOL has set forth in detail in *Wireline Broadband* comments, DSL providers that sell bulk DSL services to ISPs are offering telecommunications services as common carriers under the Act. Commission precedent has affirmed this appropriate regulatory classification for DSL providers<sup>14</sup> and, as set forth in comments of AOL and other parties, the Communications Act compels that JLEC DSL should be treated as common carriage services.<sup>15</sup> As such, DSL providers, like all telecommunications service providers, should remain fully subject to the requirements of Section 222 and the FCC’s implementing regulations.

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<sup>12</sup> While the *Third FNPRM* (¶ 147) asks, “whether carriers can sell CPNI as an asset,” this matter is less significant than preservation of customer’s CPNI rights and reasonable expectations as carriers exit and others acquire new businesses.

<sup>13</sup> *Third FNPRM*, at ¶ 147.

<sup>14</sup> *In the Matter of GTE Telephone Operating Cos., Memorandum Opinion and Order*, CC dkt. No. 98-79, FCC 98-292 (rel. Oct. 30, 1996); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24012, ¶ 37 (1996); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 21 (1999); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling rules in the Interexchange, Exchange Access and Local Exchange Markets, Report and Order*, 16 FCC Rcd. 7416 at ¶ 46 (2001).

<sup>15</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Notice of Proposed Rulemaking*, FCC No. 02-42 17 FCC Rcd. 3019 (2002), Comments of AOL Time Warner Inc., May 3, 2002. (“*Wireline Broadband NPRM*”).

While the *Third FNPRM* (§ 146) asks whether application of Section 222 to DSL providers would “change if the Commission adopts the tentative conclusions in the Wireline Broadband NPRM,” AOL notes that the *Wireline Broadband NPRM* expressly reached no “tentative conclusions” to reclassify bulk wholesale DSL from its present classification as a telecommunications service.<sup>16</sup> If, however, DSL services sold to ISPs were to be reclassified as “information services” and *not* “telecommunications services,” this would deprive ISPs of the privacy protections intended under Section 222 of the Act, and undermine end user’s expectations that their DSL orders would be private.

Equally significant, if Section 222 did not apply as a result of decisions reached in the *Wireline Broadband* proceeding, then ILECs would presumably use the CPNI of competing ISPs ordering DSL to the ILEC’s ISP advantage. This, in turn, would inhibit competition in the high-speed Internet access market because the ISP’s primary DSL input supplier – the ILEC – would also exploit the ISP’s customer information without paying the costs of marketing and customer service paid by independent ISPs. The creation of this FCC regulatory disparity would be a serious setback for the promotion of a diversity of high-speed Internet services for the American public. AOL believes that the loss of privacy rights under Section 222, especially for existing customers that have services in place and a legitimate expectation of privacy, is yet another example of why reclassification of DSL services would be an extremely poor policy decision.

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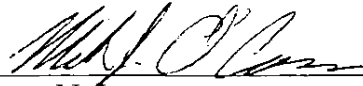
<sup>16</sup> *Wireline Broadband NPRM*, § 26. The *Wireline Broadband NPRM* does not tentatively conclude that “DSL providers” should be treated as information service providers. Rather, it tentatively concluded that “high-speed Internet access service” of wireline carriers, which combines Internet access with DSL services, should be deemed an information service. *Id.*, at §§ 24, 25.

Conclusion

AOL urges the Commission to address the three points of clarification outlined above for ISPs protect effectively their competitively-sensitive CPNI as they order telecommunications services from carriers. Further, the Commission should state clearly that neither bankruptcy nor the sale of assets *excuses* a carrier from compliance with their CPNI obligations.

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Certificate of Service

I, Sybil A. Strimbu, state that copies of the foregoing "Comments of America Online, Inc." were delivered by hand or sent by regular mail, this day, October 21, 2002 to the following:

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